MOTION FILED
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No. 92-519

IN THE

Supreme Court of the United States

October Term, 1992

T.K. WETHERELL, Speaker of the Florida House of Representatives, PETER R.WALLACE, Chairman of the Reapportionment Committee of the Florida House of Representatives, LAWTON CHILES, Governor of the State of Florida, ROBERT A. BUTTERWORTH, Attorney General of the State of Florida, and JIM SMITH, Secretary of State of the State of Florida,

Appellants,

v.

MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHEL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER SOUTO, JUSTO LUIS POSO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID and BROOKS WHITE and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Northern District of Florida

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS AND COMMUNITY RELATIONS COMMITTEE OF THE GREATER MIAMI JEWISH FEDERATION IN SUPPORT OF APPELLANTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The American Jewish Congress and the Community Relations Council of the Greater Miami Jewish Federation seek leave to file this brief *amici curiae* in support of appellants.

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the political, civil and economic rights of American Jews and all Americans. To this end, it has long supported legislation and judicial action to eliminate discrimination in the franchise. As early as the 1940's, it supported federal legislation to eliminate discrimination in voting.

The Community Relations Committee (CRC) of the Greater Miami Jewish Federation is the advocate for the survival and security of the Jewish community both at home and

abroad. Through a broad coordinated program of activity, the CRC gives high priority to protecting democratic constraints, particularly the Bill of Rights; and fostering a plural democratic society in the United States. Founded in 1973, the CRC is committed to the values of Jewish tradition and the American democratic heritage.

The interest of the *amici* in this case is not one merely of support for the historically important principle that the government ought not to inject race or ethnicity into the electoral process. The issues raised have practical consequences for the Jewish community, which for complex demographic and historical reasons is particularly likely to live in close proximity to minority groups.

Starting with the redistricting challenged in *United Jewish Organizations*

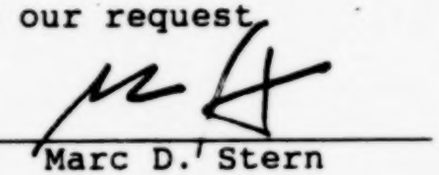
of Williamsburgh v. *Carey*, 430 U.S. 144 (1975), through last year's New York City and California redistricting, and now this case, Jewish communities which are physically compact, cohesive and which would ordinarily find themselves in one district, find themselves deliberately split asunder in the pursuit of majority-minority districts. As a result, Jews in these areas find themselves reduced to political impotence in local elections.

Jews, at least the Jews *amici* speak for, make no claim to proportional or group representation for themselves. Demographic changes, political boundaries, shifting political alliances, among other causes, may cause clusters of Jews to find themselves divided into two or more districts.

No one and no group, including Jews, has any constitutional or statutory right to a

districting configuration which enhances its influence. But it is one thing to say that a group must take its chances in the districting process, or that the districting process may not systematically suppress a political faction. It is quite another to say, as the District Court did here, that some racial groups have group rights to have their influence artificially enhanced and that others do not; indeed that some racial, religious or ethnic groups may be rendered politically impotent to leverage the political power of other groups. Because the statute was not intended to produce this blatantly unfair result, the judgment below ordering it should be reversed.

The appellants have consented to the filing of this brief. The other parties have not responded to our request.



Marc D. Stern

INTEREST OF THE *AMICI*

The interest of the *amici* is set forth in the motion for leave to file the brief *amici curiae*.

STATEMENT OF THE CASE AND FACTS

Although the facts are by and large not in dispute, the *Amici* adopts the Appellant's statement of the case and statement of the facts.

INTRODUCTION

The legislative redistricting which followed the 1990 decennial census was the first to be conducted under the 1982 Amendments to the Voting Rights Act, 42 U.S.C, § 1973 *et seq*. Those amendments impose an obligation on those charged with redistricting to ensure that minority voices are neither intentionally nor inadvertently submerged or silenced.[1]

The extent of this obligation is far from clear, as cases already decided by this Court this term or awaiting decision

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1. The scholarly literature is divided over the extent and wisdom of this obligation. Compare T. O'Rourke, The 1982 Amendments and the Voting Rights Paradox with B. Grofman & C. Davidson, What Is The Best Way to a Color Blind Society, both in B. Grofman & C. Davidson, Controversies in Minority Voting (1992). Some other theoreticians seem to have abandoned all pretense of seeking color-blindness through the Voting Rights Act and read the Act as a charter for minorities to organize themselves politically. See L. Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich.L.Rev. 1077 (1991); L. Guinier, No Two Seats: The Elusive Quest For Political Equality, 77 Va.L.Rev. 1413 (1991).

as of this writing indicate. *Voinovich* v. *Quilter*, 1993 W.L. 50520; *Growe* v. *Emison*, 113 S.Ct. 1075 (1993); *Shaw* v. *Reno*, O.T. 1992, No. 92-357. But these cases only reflect a very small percentage of the explicitly racial districting which occurred during the past redistricting cycle.

Many legislative bodies, unsure of the exact scope of their obligations under the VRA, simply adopted the view that the Voting Rights Act in all circumstances requires the creation of majority-minority districts wherever it is theoretically possible to do so, no matter how uncouth the resulting district, or other costs to the political system[2]. Politicians act

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2. *Arduous Ritual of Redistricting Ensures More Racial Diversity*, Congressional Quarterly (October 24, 1992), p. 3355; see *Democrats Court Minorities To Counter GOP's Pitch*, Congressional Quarterly (May 4, 1991) p. 1103; *Racial Gerrymandering*, New York

(continued...)

this way to avoid financially and politically costly litigation and to avoid accusations of racism. In many instances, little or no effort was made to determine whether the *Thornburgh* v. *Gingles*, 478 U.S. 30 (1986) factors were satisfied or whether the political system was open to minorities. Rather, the search was for ways to create majority-minority districts as the touchstones of compliance with the VRA. *Cf*. Minnesota S.C.R. 2 (1991) (requiring maximization of minority power in redistricting).

Several factors give rise to the regnant uncertainty, not least of which is

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2.(...continued)
Times (July 16, 1991), at p. A18, col.1; *Letter from J.R. Dunne, Assistant Attorney General for Civil Rights to Judith Reed, Esq.* (June 19, 1991) (withholding pre-clearance from New York City council redistricting; noting that city held erroneously that only minorities can represent majority-minority districts); *Brown Says Uncertainty of Jewish Vote Dictated Drawing of District*, Los Angeles Times (September 20, 1992), at p. A3, col.1.

the fact that the 1982 Amendments were the product of a last minute compromise, dictated by political necessity in which the intense political pressure to overturn this Court's decision in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980) imposing an intent standard, and at the same time the political need to avoid openly legislating racial proportionality. The resulting compromise sometimes appears to be at war with itself, as Justice O'Connor observed in *Thornburgh* v. *Gingles*, 478 U.S. at 84.

Then, too, this Court's decision in *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977) ("*UJO*"), which upheld some consideration of race in districting, has been read broadly to sanction all forms of 'benign' racial districting at least if the asserted purpose is in compliance with the Voting Rights Act; see *Shaw* v. *Reno*, probable jurisdiction noted, 113 S.Ct. 653

(1992) (dismissing for failure to state a claim a "reverse discrimination" challenge to a majority minority district).[3]

Such a reading is a possible, but not necessary, reading of *UJO*. The narrowest reading of this Court's opinion in that case is that racial districting is constitutionally acceptable where necessary to avoid regression of minority voting strength, not that states are constitutionally permitted to maximize the political strength of minorities at the expense of other groups, the statutory standard the trial court used here.[4]

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3. *Cf. Ravich* v. *City of New York*, ____ F.Supp. ____, No. 90-Civ-5752 (S.D.N.Y. 1992) (invalidating N.Y. City charter provision requiring strict proportionately in appointments to districting commission.)

4. Moreover, *UJO* was decided before this Court's now lengthy, if wavering, line of decisions considering race conscious programs in a variety of contexts. Compare, *e.g.*, *Metro Broadcasting* v. *FCC*, 497 U.S. 547 (1990) with *City of Richmond* v. *Croson*, 488 U.S. 469 (1989). Some of those decisions (continued...)

Finally, it is the case that the first generation of Voting Rights Act ("VRA") cases involved exclusion of minorities from the political process. This generation of VRA cases, beginning with *Allen* v. *Board of Elections*, 393 U.S. 544 (1968), were variations on the "inexorable zero" to which this Court has referred in other civil rights contexts, *International Brotherhood of Teamsters* v. *U.S.*, 431 U.S. 324, 342, n.23 (1977) and which properly call forth stringent remedies. Cf. *Local 28, Sheet Metal Workers* v. *EEOC*, 478 U.S. 421 (1986) (hiring quota as remedy for flagrant employment discrimination).

4.(...continued)
suggest, but again do not require,further restriction on the use of race-conscious government actions than suggested by *UJO*. Others could be read to hold that because the Voting Rights Act is congressional legislation it is largely free of those restraints.

Whether those remedies are appropriate (or intended by Congress) in other cases where minorities are active and full participants in the political process is surely not finally determined by those early decisions. Indeed, there is indication in the Congressional Record that the sponsors of the Act intended the remedies to be flexible, guided by the principles of equity, and applied in response to the severity of the violation. 127 Cong. Rec. 14,138, June 17, 1982 (remarks of Senator Mathias).

It is true that some academic experts and prominent VRA litigators have read the Act as if it were a charter for minorities to eschew traditional political avenues and political organizations, and create a new race-centered politics.[5] As a reading

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5. See the articles cites in note 1, *supra*.

of these advocates' writing indicate, advocates of this view do not make any serious effort to demonstrate that the VRA was so intended by Congress.

There is also substantial conflicting evidence overlooked by proponents of this view. To take the most obvious example, the proviso against proportional representation, 42 U.S.C. § 1973(b), points in a very different direction but is often not mentioned at all by proponents of ever more stringent VRA remedies. See *e.g.*, L. Guinier, No Two Seats: The Elusive Quest For Political Equality, 77 Va.L.Rev. 1413 (1991); L. Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich.L.Rev. 1077 (1991) (calling for proportionate interest representation); P. Karlan, Maps and

Misreadings, 24 Harv. Civ. C.R.-C.L. L.Rev. 173 (1989).

This case hinges on whether the Voting Right Act is a traditional anti-discrimination statute on the one hand, or serves as a charter for racial politics on the other. Because it is so clear that Congress intended the former interpretation, but that the court below adopted the latter, its judgment should be reversed.

I. THE VOTING RIGHTS ACT GUARANTIES MINORITIES AN OPEN POLITICAL SYSTEM, NOT ELECTORAL SUCCESS

A. Plaintiffs Have Not Carried Their Burden of Proof

This Court insists that "the federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements." *Voinovich* v. *Quilter*, 1993 W.L. 50520, at *7 (hereafter "*Voinovich*"). *Cf. Growe* v. *Emison*, 113 S.Ct. 1075 (1993). Florida's

House redistricting plan[6] was thus presumptively entitled to be accepted even though it was not the plan most favorable to Hispanics, unless it violated the VRA. *Voinovich* v. *Quilter*, *supra*. And because "Congress could not have intended the State to prove the invalidity of its own apportionment scheme," *Voinovich*, 1993 W.L. at *8, the plaintiff had the burden of proving that the state's House redistricting plan illegally diluted the Hispanic vote in southern Florida.

That is, plaintiff in this case was required to prove in that case that the legislature's plan, in light of all the

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6. *Amici* takes no position in regard to the challenge to the Senate redistricting plan at issue in *U.S.* v. *Florida*, No. 92-767 and *DeGrandy* v. *Wetherell*, 92-593, except to note that the problem of conflicting group claims presented in that branch of the case is a direct result of the trial court's interpretation of the Act as requiring maximum marshalling of minority political strength, which resulted in a clash of obligations that would not have existed under the standard we propose.

surrounding social, political and historical circumstances, was less open to Hispanic participation than to participation by other racial, ethnic or language groups in South Florida. Florida was surely under no obligation to defend its plan by proving that there was no other plan that would increase to a greater degree the political potency of Hispanics.

It was because there was no proof that elections in the Ohio legislature were not equally open to African-Americans that this Court in *Voinovich* rebuffed a challenge to Ohio's legislatively drawn plan. There, this Court rejected the argument that because there existed an alternative plan more favorable to African-Americans, the proffered plan was illegal. The unanimous decision in *Voinovich* stands unambiguously for the proposition that maximization of minority

political power or the bare possibility of drawing minority districts is not the relevant test under § 2.

It is unnecessary to decide in this case the question mooted by the parties here of whether vote-dilution should be measured with regard to voting age population, regardless of citizenship, as the trial court held [31a],[7] or whether the appropriate figure is those eligible to vote (*i.e.* citizens) as appellants contend. For present purposes, it is sufficient to accept the VRA figures used by the District Court. Even using these figures, the legislature's redistricting plan should have been upheld.

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7. All citations [___a] are to the Appendix to the Jurisdictional Statement of the *Wetherell* appellants in O.T. 1992, 92-519.

B. The Fact that Hispanics Enjoy Proportional Representation Defeats Their § 2 Claim

Under the plan proffered by the legislature (SJR 2-G) half (9 of 18) of the House seats at issue represent majority Hispanic districts. Approximately 49% of the relevant population is Hispanic (953,407/1,937,094) [44a]. Thus, even if no adjustments are made for the large number of Hispanics who are not yet of voting age (to say nothing of those who are ineligible to vote because they are not citizens), Hispanics as a group would have enjoyed slightly more than fully proportional representation under the legislature's plan. It therefore cannot be said that legislative races in South Florida were "not equally open to participation," 42 U.S.C, § 1973, by Hispanics.

Thornburgh v. *Gingles*, 478 U.S. 30 (1986), holds that a showing of electoral proportionality necessarily defeats a § 2 claim. This is not because the Act requires proportionality, an interpretation the statute itself disavows. 42 U.S.C. § 1973(b). Rather, electoral success is dramatic and conclusive proof that "the political processes are . . . equally open to participation by members of a class of citizens protected [by the Act]." 42 U.S.C. § 1973(b). As we demonstrate below, this phrasing was carefully chosen to focus on the structure and actual functioning of a given electoral practice, not simply on the outcome of that system measured exclusively on whether minorities enjoyed electoral success. See Point II *infra*.

Of all the factors which the courts are mandated to consider in evaluating

"totality of [the] circumstances," 42 U.S.C. § 1973(b), to determine whether, in the language of the statute "the political processes are . . . equally open . . . ," see S.Rep. No. 94-917 (1982) at pp. 28-29, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 205-06, the only circumstance actually enumerated in the statute is the "extent to which members of a protected class have been elected to office" 42 U.S.C. § 1973(b), a factor here pointing decidedly in favor of upholding the Legislature's plan.[8]

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8. All nine of the districts designated for the Hispanic community under the legislature's plan put into effect under a stay granted by this Court, *Wetherell* v. *DeGrandy*, 113 S.Ct. 1 (1992), actually elected Hispanics to the Florida House of Representatives.

To the extent that minority electoral success facilitated by § 2 advances other goals, such as ensuring that minority concerns are considered and that openly racist conduct in the legislature is suppressed, see Abrams, Raising Politics Up: Minority Political Participation and § 2 of the Voting Rights Act, 63 N.Y.U.L.Rev. 449

(continued...)

The success of minority candidates is important not because the Act confers a substantive right to electoral success on protected classes, but because such success proves that the political process satisfies the statutory standard of being "equally open" to all. 42 U.S.C. § 1973. [emphasis added]

Electoral success demonstrates that the system does not embody open or hidden structural barriers to minority success and does not freeze into place *de jure* or *de facto* electoral or societal discrimination which "results in a denial or abridgment" of the right to vote. Success likewise demonstrates that without even more heavy-handed government intervention

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8.(...continued)
(1988), these goals are also fully vindicated by the Legislature's plan.

on a racial basis, minority voters can effectively make their voices heard.

Accordingly, where a political arrangement is demonstrably open to minorities, even if the three *Gingles* criteria exist -- that is, if there is a majority-minority district which can be drawn, if minority groups are politically homogenous and if voting is somewhat polarized -- no violation of the Voting Rights Act exists.

In *Gingles* itself this Court refused to sustain a finding of a § 2 violation in a North Carolina district in which minorities experienced substantial electoral success even without a majority-minority district, although it was possible to draw such a district.[9] That holding, with

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9. To be sure, the Florida plan has not yet evidenced sustained ability to allow the election of candidates of choice for the Hispanic community as did the North Carolina (continued...)

regard to a single district in *Gingles*, should surely be applicable to half the seats in Dade County as well.

II. THE LEGISLATIVE HISTORY REFUTES THE TRIAL COURT'S INTERPRETATION OF THE ACT

A. The Act Does Not Require Maximization Of Minority Voting Power

Notwithstanding the plain language of the statute, and the controlling decision in *Thornburgh* v. *Gingles*, *supra*, the trial court in this case found that it was necessary to divide up South Florida so as to create those two additional Hispanic

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9.(...continued)
district. That lack of sustained success will always be present in regard to new redistricting plans, but unless plans may never be changed, this is an unavoidable state of affairs in each state once every decade.

Florida's districting plan was carefully designed to provide for minority access to the political process. These lines may not guarantee Hispanic representation over the entire decade, but there plainly is no right to such a guarantee. And in the one election conducted since redistricting, the lines drawn worked precisely as predicted. See note 8, *supra*.

seats. This was required in the court's view merely because all three *Gingles* criteria could be satisfied in an additional two districts, not just the nine included in the state's plan.[10]

The proponent of the remedial plan ultimately adopted by that court, appellee DeGrandy, minced no words in explaining the political goals of the modified "Hispanic seat proposal." The plan, he said, was motivated by a self-serving desire to "boost our seats or minority seats more than they are in the [plaintiff's original] plan." [71a].

This it "should be done if it can be done" standard, *Solomon* v. *Liberty County*, 899 F.2d 1012, 1039 (11th Cir. 1990)

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10. The court was careful to note that its revised plan would not "adversely affect African-Americans." Apart from this statement, the impact the court's revised districting might have on non-Hispanics or non African-Americans was neither mentioned or elaborated on.

(Hill, J., concurring), is at war with the VRA as explained in the authoritative Senate Report, see *Gingles*, 478 U.S. at 43, and *id*. at n.7, and indeed throughout its legislative history.

The Act was intended to provide only a fair opportunity to participate in the political process, not to carve out a permanent exception to the results of the majoritarian political process. The VRA serves only to remove structural obstacles to minority participation, not to distort the system in their favor.

Neither the problem which Congress sought to solve through passage of the 1982 amendment to the VRA, nor one word of the legislative history even suggests, let alone requires, the interpretation of the Act adopted by the trial court, placing such a heavy racial thumb on the electoral scales. On the contrary, the opposition

to the revision of § 2 revolved around whether it could be construed to do just that. Those who sought to revise § 2 had to persuade their colleagues that proposed § 2 was not a vehicle for any form of mandated racially proportionate results.

Finally, as a practical matter, maximization of one group's power means the minimization of another's. This is so because seats cannot be apportioned with mathematical precision, so that maximizing minority representation must necessarily come at the expense of some other group. This fact of political life is wholly ignored in the District Court's opinion.

More importantly, districts whose purpose it is to elect officials of a particular racial or ethnic group are organized so that the majority group will be wholly dominant and beyond challenge. Its domination stems precisely from the

suspect grounds of racial or ethnic solidarity. Other groups are designedly politically irrelevant, nothing more than one person, one vote filler, all of whom are to be vicariously represented by whites elsewhere, without any thought to whether there is any commonality between whites.

B. The Problem Confronting Congress

The central problem confronting Congress in 1982 as it contemplated § 2 of the VRA was whether and how to respond to the plurality opinion in *City of Mobile* v. *Bolden*, 446 U.S. 55, 58-80 (1980). There, this Court held that a successful claim under § 2 of the VRA (as well as under the Fifteenth Amendment) required a showing of an invidious intent to disenfranchise a

protected group.[11] Critics of the decision complained chiefly of the difficulty of proving invidious intent, particularly in the case of electoral systems which were of hoary age.

The debate over the question of whether *City of Mobile* v. *Bolden* should be statutorily overruled was sharp, pointed and well-informed by partisans on both sides of the issue, particularly in the Senate. At no time did any party to the debate urge on the Congress the maximization standard adopted by the District Court in this case.[12] On the

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11. An alternative holding of the *Bolden* Court was that vote dilution did not violate either the Fifteenth Amendment or the VRA, 446 U.S. at 65, or § 2. There is no recorded congressional opposition to overturning this branch of the *Mobile* decision.

12. What follows draws on an independent review of the legislative materials, as well as on the excellent accounts of A.M. Thernstrom, Whose Votes Count: Affirmative Action and Minority Voting Rights (1987) (hereafter "Thernstrom, Whose Votes") and

(continued...)

contrary, throughout the debate the focus was on eliminating discrimination in the electoral process.

C. Proceedings in the House - Round 1

The intent/effect issue was not the major thrust of the House proceedings, which focussed on extending the pre-clearance provisions of § 2 and the bilingual provisions, 42 U.S.C. § 1973 b(f), of the Act. Nevertheless, several proponents of overruling *City of Mobile* v. *Bolden* did testify during the House Judiciary Committee hearings. Each repudiated any intent to endorse a proportionality requirement.

Former Assistant Attorney General for Civil Rights, Drew Days emphasized that the change proposed for § 2 was largely

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12.(...continued)
Judge Tjoflat's comprehensive concurring opinion in *Solomon* v. *Liberty County*, 899 F.2d 1012, 1021-37 (11th Cir. 1990).

evidentiary in nature. General Days testified that because the proposed revision drew largely on this Court's decisions in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971) and *White* v. *Register*, 412 U.S. 755 (1973), both of which rejected claims for proportional representation, the revised § 2 would not create a right to proportional representation. See Extension of the Voting Rights Act, Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary of the House of Representatives (Serial No. 24), Part 3, p. 2149.[13]

The House Judiciary Committee left the prior structure of § 2 largely intact, simply specifying a results test and

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13. Attorney General Days was seconded by a number of seasoned Voting Rights Act litigators at these hearings. See id. at 2037 (testimony of James Blacksher); id. at 2057 (testimony of Armond Derfner).

providing that the lack of proportionality did not itself constitute a violation:

> Section 2 of the Voting Rights Act of 1965 is amended by striking out "to deny or abridge" and inserting in lieu thereof "in a manner which results in a denial or abridgement of" and is further amended by adding at the end of the section the following sentence: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."

H.R. 3112, 97th Cong., 1st Sess. § 2, 127 Cong. Rec. 6565 (1981).

Further evidence that the Committee was not seeking to impose a maximization requirement, but simply to expand on the acceptable proof of illegal discrimination, is that it continuously referred to the need to prove discrimination. Thus, in its report, the Committee emphasized first that "discrimination

continued to plague electoral processes", see H.R. Rep. 97-227 at, e.g., 13, 14, 17, 18 (at large elections), 19 (gerry-mandering).

The Committee further explained the need for a reversal of *City of Mobile* v. *Bolden* in order to facilitate successful challenges to long-standing discriminatory practices not subject to § 5 pre-clearance. *Id.* at 28. The need to end discrimination is the *leit motif* of this section of the Committee Report's discussion of § 2. *Id.* at 28-31.

For all its emphasis on eliminating discrimination, the Committee was at pains to disavow any implication that the Act would, if amended, require proportionality precisely because the Committee did not equate non-discrimination with proportionality:

> The proposed amendment does not create a right of proportional representation. Thus, the fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population does not, in itself, constitute a violation of the section although such proof, along with other objective factors, would be highly relevant. Neither does it create a right to proportional representation as a remedy.

Id. at 30. The bill easily passed the House.

During the entire course of the House proceedings, the Reagan Administration took no position on § 2. A. Thernstrom, Whose Votes at 113-17. By the time the bill reached the Senate, however, the Administration announced its opposition to a change in § 2 on the ground that it would necessarily lead to proportional representation. *Id.* at 116; 1982 Congressional Quarterly Almanac, Voting Rights Act Extended, 373, 374 (1992).

D. The Senate Subcommittee On the Constitution - Round 2

When the bill reached the Senate, it was referred to the Subcommittee on the Constitution of the Senate Judiciary Committee, then chaired by Senator Orrin Hatch. After extensive hearings, which unlike the House Committee hearings provided a platform for both those who favored and opposed amending § 2, see A.M. Thernstrom, Whose Votes at 85-87; 120-30, the Subcommittee voted to leave § 2 intact. Proponents of amending § 2 denied in their testimony that the change was intended to, or would have the effect of, mandating proportional representation.

The Subcommittee's Report[14] explained that the revised version of § 2 posed an unacceptable risk of requiring propor-

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14. The Subcommittee Report is reprinted as an Appendix to the Senate Judiciary Report at p. 108; 1982 U.S. Code, Cong. & Admin. News at 278.

tional representation, notwithstanding the disclaimer that proof of a lack of proportional representation was not itself proof of a violation:

> However, under the proposed change in section 2, the right established is to a particular result and so, inevitably, much more will be required to provide an adequate remedy. The obligations of judges will require use of their equity powers to structure electoral systems to provide a result that will be responsive to the new right. Otherwise, the new right would be without an effective remedy, a state of affairs which is logically and legally unacceptable. [footnote omitted]

S.Rep. at 140, 1982 U.S. Code Cong. & Admin. News at 312. Moreover, the Subcommittee was not persuaded that the damage had been cured by the "disclaimer" language in the House-passed version of the revised § 2:

> The disclaimer provision will have virtually no practical significance in preventing the ultimate imposition of propor-

tional representation. In short, the disclaimer merely adds the necessity of proving, as an element of the new section 2 claim, one or more "objective factors of discrimination" that purport to explain or illuminate the failure to elect in numbers equal to the group's proportion of the population. The sub-committee finds this addition totally illusory as a bar to proportional representation since the courts and the Justice Department in the context of section 5 and elsewhere have already identified so many such factors that one or more would be available to fully establish a section 2 claim in virtually any political subdivision having an identifiable minority group.

S.Rep. at 143, 1982 U.S. Code Cong. & Admin News at 315.

E. The Senate Judiciary Committee - Round 3

The full Senate Judiciary Committee rejected both the House version, on the one hand, and the Subcommittee's rejection of any change in § 2 on the other. Its compromise language, largely crafted by Senator Dole (together with Senators

Mathias and Kennedy), ultimately became the new § 2.

The compromise had two key elements. First, instead of the bare addition of explicit sanction for a results test, the compromise spelled out that a court was to look to all the circumstances surrounding the use of a particular electoral device or practice, not just to who was elected. The courts were to judge the openness of the system, not the race or ethnicity of the successful candidates.

Second, the ban on claims of proportional representation was strengthened. Unlike the House version, which merely would have barred claims for pure proportional representation, unaccompanied by other evidence, the compromise flatly declared that no group is entitled to proportional represen-tation.

The Senate Judiciary Committee's Report was at great pains to explain that the compromise did not embrace any system of proportional representation, and that the compromise rejected claims that any disparities between the number of officials of a particular race or ethnic group elected[15] and the protected group's numerical strength itself stated a claim.

On the contrary, the Report emphasized the compromise's deep roots in

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15. In *Thornburgh* v. *Gingles*, the plurality opinion of Justice Brennan refers to the election of candidates of choice, and rejected any identification of this concept with an identity between group and representative(s), a position apparently rejected by Justice White, 478 U.S. at 83. In the real world, candidates of choice are almost always thought of as being of the same group. Thus, in New York City, a white incumbent was deliberately drawn out of her district because the districting commission believed that a white could not under the VRA represent a minority district. See, *Alter* v. *Macchiarola*, 91-Civ-2232 (E.D.N.Y.) (pending).

earlier decisions of this Court,[16] each of which explicitly repudiated any claims of proportionality; as well as decisions of the former Fifth Circuit,[17] which likewise disclaimed any requirement of proportional representation.

Instead, the full Committee's Report emphasized both that the effects test was designed to deal with the problem of discrimination, whether intentional or otherwise, see, e.g. S.Rep. at 19, 20, 22, 28, 30, 37, 39, 40, 43. 1982 U.S. Code Cong. & Admin. News at 196, 197, 199, 206, 207, 215, 217, 218, 221, and that a claim could be made out only after a searching inquiry into the functioning of a political unit to determine whether, under the

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16. *White* v. *Register*, 412 U.S. 755, 765-66 (1973); *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971).

17. *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

"totality of the circumstances," political life was tainted with discrimination, not merely whether there is some raw, statistical imbalance. S.Rep. at 23-34, 1982 U.S. Code Cong. & Admin. News at 204-212.

The Senate Judiciary Committee report's list of eight factors (cited in *Thornburgh* v. *Gingles*, 478 U.S. at 44), was to guide courts in assessing whether a challenged electoral arrangement effectively discriminated against minorities in the electoral system, not to enable them to determine whether minorities enjoyed proportional representation, much less maximization of minority political power. The spokesperson for the Leadership Conference on Civil Rights, the leading private advocate for the revised § 2 concurred in this assessment. A.M. Thernstrom, Whose Votes at 125-27.

Because of this statutory insistence on a searching review of the 'totality of the circumstances,' the Committee asserted that the Dole compromise "will not present the dangers raised by those who have opposed it -- a requirement of quotas or an all-out assault on at large elections systems in general." S.Rep. at 27, 1982 U.S. Code Cong. and Admin. News at 204-05.

Moreover, the Committee was at pains to emphasize that the burden of proving discrimination was on the plaintiff. It expressed the view that this allocation of burdens of proof would prove to be an onerous burden on plaintiffs, thus further preventing implementation of any system of proportional representation. S.Rep. at 33, 1982 U.S. Code Cong. & Admin. News at 211.

The Committee dealt directly with the claim advanced by the Subcommittee Report

and the Reagan Administration that an effects test would lead to racial quotas:

> Under the results test, the cases never required proportional representation, and invariably repudiated it. This conclusion has not been challenged by any of the testimony. This rejection of proportional representation as the standard for legality under the results test is explicitly incorporated into the statute by the disclaimer, based on the holding in *White*. The disclaimer squarely states that the Section creates no right to proportional representation for any group.

S.Rep at 33, 1982 U.S. Code Cong. & Admin. News at 210-211.

F. The Full Senate - Round 4

The final hurdle for the bill was the Senate itself, where several Senators engaged in a filibuster against it. Again and again supporters of the compromise argued that there was no possibility of the bill leading to quotas or proportionality; instead, they insisted, to use

Senator Dole's phrase, that it provided only "equal access to the political process. 127 Cong. Rec. 14,139-140 (June 17, 1982). See also, *id.* (remarks of Senator Grassley); *id.* at 14,135-36 (remarks of Senator Kennedy) ("equal opportunity to participate"); *id.* (remarks of Senators Mathias and Heflen); *id.* at 14138 (remarks of Senator Mathias); *id.* at 14090 (remarks of Senator Hatch). The House quickly accepted the Senate's version after perfunctory debate.

G. What Hath Congress Wrought?

The statutory proviso barring claims of proportionality, when read *in pari materia* with the more detailed description of the elements of claim of illegal discriminatory effects embodied in the Senate's compromise version of § 2, does more than just bar direct claims for proportional representation. Rather, it

reaffirms that the Voting Rights Act is a traditional anti-discrimination statute, one which requires some showing of being disadvantaged in the electoral process because of one's race, ethnicity or language. In other words, it requires proof of cognizable discrimination.

A redistricting plan such as that proposed by the Florida legislature, under which a group enjoys a full measure of political power, hardly disadvantages or discriminates against that group. Since a claim by Hispanics to 50% of the legislative seats in South Florida because they comprise half of the population would have to be dismissed at the outset, it should follow that a claim for more than a proportional share should likewise not be entertained, much less upheld.

III. THE THREE *THORNBURGH* v. *GINGLES* CRITERIA ARE THRESHOLD REQUIREMENTS, NOT ALONE SUFFICIENT TO SUSTAIN A CLAIM OF VIOLATION

A. The Act Requires Attention to the Totality of the Circumstances, Not Just Three Core Factors

Of the various factors listed by the Senate Judiciary Committee report to be utilized by the courts in thoroughly investigating the political ecology of a community -- a list the Committee emphasized was not exhaustive -- the District Court relied almost exclusively on three core factors highlighted in *Thornburgh* v. *Gingles* [28a-30a] -- that is, whether the minority group is "sufficiently large and geographically compact to constitute a majority in a single member district; (2) whether it is politically cohesive; and (3) whether the white majority votes sufficiently as a block to defeat minority political

interests. What these three factors have in common is that they emphasize the importance of the creation of majority-minority districts as the acid test of compliance with the Voting Rights Act.

The court therefore did not undertake the searching analysis of the availability to Dade County Hispanics of other forms of effective access to the political process. Surely, though, it is possible to be politically effective, even dominating, without constituting a majority of any particular district. The National Rifle Association is a conspicuous example.

In taking this statistical shortcut, the District Court substituted what amounted to a thinly-veiled, if objective, proportionality analysis for the more searching, albeit more subjective, test of political effectiveness which the Congress mandated in adopting the 1982 Amendments.

As we have demonstrated in Point II, *supra*, the Congressional insistence on this searching inquiry into political realities was central to the compromise which led to passage of the amended § 2.

The District Court's treatment of the last factor in its truncated analysis -- political cohesiveness -- is particularly telling of its vision of minority dominated districts as <u>the</u> acid test of compliance with the Voting Rights Act.

There was no finding that the various Hispanic subgroups shared a common agenda on the issues which were determinative of votes for members of the Florida House [45a]. There was evidence of substantial political differences between the various subgroups comprising Dade County's Hispanic population. To be sure, there was also contrary testimony that Hispanic groups share common viewpoints on several

important issues, notably those involving language [46a-47a].

Rather than explain how it chose one or the other of these versions of political truth, the District Court concluded, without weighing these competing political facts of life as they affected election outcomes, that there were sufficient common interests to satisfy the *Gingles* test [47a].[18] What that might be other than the bare fact of a common language is left unclear and unstated.

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18. There was testimony (which the District Court credited) that despite the fact that Puerto Ricans and Cubans do not share a common party affiliation, they were cohesive because Hispanic Democrats (*i.e.* Puerto Ricans) will vote for Hispanic Republicans (*i.e.* Cubans) over an 'Anglo' candidate [47a]. Contrary to what the District Court believed, this testimony does not prove political cohesiveness. Instead it proves mere racial or ethnic cohesiveness which under the trial court's approach is rewarded by the VRA. These cannot be the same thing if Congress' disclaimer of any interest in enacting a principle of proportional representation is to be given any weight. That the trial court conflated the two is indicative of that court's fundamentally flawed approach to the VRA.

Of the remaining factors listed by the Senate Committee, the District Court mentioned only the existence of discrimination in South Florida, both in the past and present. With respect to Hispanics, the court pointed only to "Hispanic fear of anti-Spanish backlash" [53a], including a reference to an affidavit listing some unspecified number of instances of language-based discrimination against Hispanics.

Significantly, the court did not point to any evidence that these fears of backlash were substantially justified. One is also left to speculate about how wide-spread this pattern of discrimination was, whether instances of discrimination were redressed promptly when identified, whether discrimination had any measurable impact on the electoral process, and whether it was sufficiently widespread and

significant to justify the invalidation of a plan creating nine Hispanic seats in favor of an even heavier electoral tilt towards Hispanics.[19]

Discrimination is relevant to VRA analysis not because in the manner of original sin it taints a jurisdiction forever, *City of Mobile* v. *Bolden*, 446 U.S. at 74. Rather, it should be significant if, and only if, the lingering effects of prior discrimination have a current adverse impact on the ability of minority groups to effectively exercise political power on an equal basis with others. See S.Rep. at 33, 1982 U.S. Code Cong. and Admin. News at 211 (rejecting charge that revised § 2 presumes that race

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19. As further evidence of discrimination, the District Court also pointed to the fact that several counties in Florida were subject to Justice Department pre-clearance. Dade County was not one of those counties.

is predominant determinant of electoral choices).

The District Court, however, made no findings tying the existence of prior or current anti-Hispanic discrimination in Dade County to the present inability of that community to exercise effective political power. Instead, it conferred almost talismanic effect on the existence of some unquantified amount of anti-Hispanic discrimination.

Equally significant are those factors the District Court did not address. It did not discuss whether there were structural barriers to full and effective Hispanic participation, such as unusually large districts or a candidate slating process controlled by the white majority. The court below likewise wholly failed to consider whether non-Hispanic office-holders were responsive to Hispanic

concerns, and whether Hispanics held other offices in the area. They do -- the Mayor of Miami, the largest city in Dade County, as well as many other local officials in Dade County, is Hispanic according to a list published by the Dade County League of Cities. It did not inquire whether the invalidated legislative plan served other important governmental interests, including facilitating other groups to exercise effective political power.

These omissions are not mere oversights. Consideration of these factors would have led the court to consider factors beyond the raw number of majority Hispanic districts. Instead, the District Court would have been forced to look to all the political realities of Dade County, and to have given consideration to other, competing, legitimate political interests.

B. The *Thornburgh* v. *Gingles* Plurality Opinion Is Not Faithful To The Legislative Purpose

The District Court is not entirely to blame for regarding the three core factors as determinative. The plurality opinion of Justice Brennan in *Thornburgh* v. *Gingles*, could be read to support the trial court's holding because it holds, *inter alia*, that once the three factors are demonstrated to exist, the remaining factors are of, at best, secondary, or even tertiary, importance. "While many or all of the factors listed in the Senate Report may be relevant . . . unless there is a conjunction of the following circumstances . . . [a practice] will not impede the ability of minority voters to elect representatives of their choice." 478 U.S. at 48.

In fact, the Eleventh Circuit itself has repeatedly split over the question of

whether the three core factors are alone enough to state a § 2 claim or whether more must be shown. See generally, *Meek* v. *Metropolitan Dade County*, 1993 W.L. 55654 (11th Cir. 1993); *Solomon* v. *Liberty County*, 889 F.2d 1012 (11th Cir. 1990). Although the trial court purported not to resolve this issue, it is impossible to conclude that it did not, resolving it in favor of a mechanical reading of *Thornburgh* emphasizing the three *Gingles* factors to the exclusion of all else.

The *Thornburgh* plurality opinion barely takes note of the stricture against proportional representation. Other than a one sentence reference to the Senate Committee report, see 478 U.S. at 46 -- a paraphrase which uses the formulation that the House of Representatives initially adopted, but which was rejected by the Senate as an insufficiently forceful and

effective bar against proportional representation[20] -- the plurality makes no reference to the central question in the Congressional debate over § 2.

The plurality opinion further distorted the legislative history by citing only those parts of the legislative history critical of the decision in *City of Mobile* v. *Bolden*, but not those parts critical of the proposed shift to a pure results test. Since those objections were the fulcrum of the debate in the Senate, and represented the position taken by the Administration, whose support was needed to secure adoption of the bill, the

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20. Justice Brennan wrote "[t]he conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation." 478 U.S. at 46, citing p.16 of the Senate Report. The language used by the plurality, however, does not appear in the Senate Report. It is lifted almost verbatim from the rejected language of the House bill. As discussed in Points II(f) and II(g), *supra*, the Senate language which became law is far more restrictive.

selective use of legislative history in *Thornburgh* v. *Gingles* leads to a distorted result.

In the two Voting Rights Act cases decided this year *Voinovich* v. *Quilter*, *supra*, and *Growe* v. *Emison*, *supra*, the Court has treated the three core *Gingles* criteria as only necessary indicia of a § 2 claim, not as sufficient grounds for a § 2 claim. Thus, in *Voinovich* v. *Quilter*, *supra*, this Court referred to the core *Thornburgh* v. *Gingles* criteria as "threshold conditions." If these criteria are not satisfied, there is no need for a court to make the searching factual inquiry demanded by the language of the statute, the legislative history and cases like *White* v. *Register* and *Zimmer* v. *McKeithen* which served as the model for the revised § 2.

What the trial court below did is quite different: it found the three core factors sufficient, mandating an invalidation of a presumptively valid state redistricting plan. Whatever little it did beyond analyzing those factors does not withstand scrutiny and was surely not the searching inquiry of the plain text of § 2. Thus, the approach of *Voinovich* v. *Quilter* is far closer to the meaning of the statute than a simplistic reading of *Thornburgh* v. *Gingles* is.

Under the *Thornburgh* plurality rule, there is little incentive for minority candidates to assert positions which appeal to a broad cross section of the electorate and to engage in cross-racial coalition building, for doing so would undermine a claim for a far safer majority-minority district.

So construed, the VRA is itself a factor in encouraging the politics of race. This is surely a perversion of a law firmly rooted in the integrationist civil rights movement of the 1960's. Jettisoning a reading of *Thornburgh* v. *Gingles* which holds that the three core factors are by themselves a sufficient basis for proving a § 2 claim would go far to restoring the VRA to its roots as an anti-discrimination statute, not a law encouraging racial separation. But even more important, limiting *Thornburgh* helps avoid the need to pass on the constitutionality of § 2.

IV. THE VOTING RIGHTS ACT SHOULD BE CONSTRUED TO AVOID THE CONSTITUTIONAL DIFFICULTIES ATTENDANT ON A STANDARD MAXIMIZING MINORITY POLITICAL POWER

Almost thirty years ago, this Court held that a state may not constitutionally encourage racial voting. *Anderson* v.

Martin, 375 U.S. 399 (1964). The Voting Rights Act of 1965 was designed to make real the constitutional promises of the Fifteenth Amendment, *Anderson*, and its progeny. It sought to give effect to the long line of this Court's cases vindicating the rights of all Americans to participate in governing their country, on an equal, and race-free basis, and to eliminate racial and racist barriers to such participation. No party to this case challenges these bedrock propositions.

There are those who believe it desirable to re-order our political system to facilitate racial, ethnic and sexual politics. They argue that it is only realistic to insist that redistricting facilitate that variety of politics, for no one can deny that these factors already play a role in the way at least some

people vote. In their view redistricting should facilitate race based politics.

But there are other arguments on the other side, arguments that are for us more powerful and persuasive. Those arguments were well put by Justice Douglas in responding to a claim put forth by minority politicians in defense of a racial gerrymander designed to create a safe minority seat:[21]

> The principle of equality is at war with the notion that District A must be represented by a Negro, as it is within the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on.
>
> . . .
>
> When racial or religious lines are drawn by the State, the multiracial multireligious communities that our Constitution seeks to weld together as one becomes separatist; antagonisms that relate to race

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21. The majority rejected the challenge to the gerrymander for want of proof of racist animus.

> or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.

Wright v. *Rockefeller*, 376 U.S. 56, 66-67 (1964) (Douglas, J., dissenting).

Amici believe that any shift to government encouragement of racial and ethnic group politics would be a radical shift from the way in which we as a nation have conceived of politics, even if we have often fallen short of that ideal. As Justice Douglas' remarks indicate, and as reinforced by the various opinions in *UJO* and this Court's recent reservation of the constitutional issue in *Voinovich* v. *Quilter*, *supra*; *cf*. *Chisom* v. *Roemer*, 111 S.Ct. 2354, 2376 (1991) (Kennedy, J., concurring), there are serious issues of constitutionality inherent in such a

system, particularly as widespread *de jure* discrimination recedes into more distant history.

If Congress intended a radical reordering of the nation's political theory -- and the singling-out of one possible organizing principle as the most important one -- it should say so explicitly, clearly and directly. It did not. Indeed, as we have shown it intentionally rejected such a possibility.

Given the long-standing rule that statutes should be construed to avoid constitutional difficulties, *Rowland* v. *California Men's Colony*, 113 S.Ct. 716, 726 (1993); *Rust* v. *Sullivan*, 111 S.Ct. 1759, 1771 (1991); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), the courts should not impose that re-ordering based on a doubtful interpretation of ambiguous statutory language.

Nor does some overriding public policy argument call for an exception to the rule calling for construing statutes to avoid constitutional difficulties. There is no self-evident "national interest in creating an incentive to define political groups by racial characteristics," *City of Mobile* v. *Bolden*, 446 U.S. at 89 (Stevens, J., concurring). *A fortiori* the courts should not impose a maximization requirement as the trial court did below in the face of a Congressional disclaimer of any intent to create any political quota system for minorities, a far less ambitious standard.

CONCLUSION

For the reasons stated, the judgment should be reversed.

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